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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

PETER ALAN KASLER, ET AL.

Petitioners,

v.

BILL LOCKYER, CALIFORNIA ATTORNEY GENERAL, ET AL.

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the add-on provision of California's Assault Weapons Control Act violates Due Process by:

   a. Providing to firearms owners and dealers only publication notice of the initiation of an add-on proceeding when actual notice is possible;

   b. Subjecting firearms owners to criminal prosecution for possession, sale, or transfer of certain firearms that were added to a list of banned firearms in a judicial proceeding in which they are not permitted to participate except as amici curiae;

   c. Conclusively determining in a civil proceeding from which owners and dealers are denied any right to intervene a key element of any future criminal prosecution, thereby depriving prosecuted owners and dealers of the rights to trial by jury, present evidence, cross-examine witnesses, and be judged under the reasonable doubt standard rather than a preponderance of the evidence standard; and

   d. Giving unbridled discretion to the Attorney General to add firearms to the prohibited list based on an unconstitutionally vague definition?

2. Whether the add-on provision of the Act violates the Equal Protection clause by affording to firearms manufacturers and California distributors, but not to owners and dealers, a right to participate in the quasi-legislative judicial proceeding by which additional firearms are added to the statutory list of prohibited firearms?

3. Whether California's decision to ban the firearms of some while not banning identical or virtually identical firearms of others is irrational and therefore a violation of the Equal Protection Clause?

PARTIES TO THE PROCEEDING

Petitioners are Prof. Howard McCord; Prof. Gary Mauser; Prof. Joseph P. Magaddino; Peter Alan Kasler; Prof. John W. Bowman; Prof. David Henderson; Sean Ford; Edgar A. Suter, M.D.; Prof. Edward Erler; James M. Mixson; Prof. Ronald Howard; Prof. Paul Krot; and Colt's Manufacturing Co., a Delaware Corporation. The parent company of Colt's Manufacturing Co. is Colt Holding Corp., a Delaware Corporation. Colt's Manufacturing Co. has no subsidiaries.

Respondents are Bill Lockyer, in his official capacity as Attorney General of the State of California; the California Department of Justice; and the State of California.

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Ross, 98 American J. Soc. 661 (1992). 20
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Petition for Writ of Certiorari

Petitioners Peter Alan Kasler, et al., California taxpayers and citizens, respectfully request that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of California entered in the above-captioned case on June 29, 2000, rehearing denied on August 16, 2000.

OPINIONS BELOW

The opinion of the Supreme Court of California, dated June 29, 2000, is reported at 1 P.3d 581 and is reproduced at pages 1a-67a of the appendix to this petition ("Pet. App."). That Court's order denying Petitioners' motion for rehearing, dated August 16, 2000, is reproduced at Pet. App. 68a. The opinion of the California Court of Appeal, Third District, dated March 4, 1998, was vacated upon the grant of review by the Supreme Court of California, but it was previously published at 72 Cal. Rptr. 2d 260 and is reproduced at Pet. App. 69a-102a. The unpublished order of the trial court dismissing the complaint is reproduced at Pet. App. 103a.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of California upholding the constitutionality of the Roberti-Roos Assault Weapons Control Act of 1989, Cal. Penal Code § 12275 *et seq.*, was entered on June 29, 2000. The court denied a petition for rehearing on August 16, 2000. A timely request for extension, filed on November 3, 2000, was granted by Justice O'Connor on November 6, 2000, extending the time in which to file this petition until December 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

The Equal Protection Clause of the Fourteenth Amendment provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The California statute being challenged in this case, the Roberti-Roos Assault Weapons Control Act of 1989, Cal. Penal Code § 12275 *et seq.*, as amended, was published as an Appendix to the California Supreme Court's opinion and is reproduced at Pet. App. 53a-67a.

STATEMENT OF THE CASE

Petitioners brought suit in the Sacramento, California Superior Court challenging the constitutionality of various provisions of the Roberti-Roos Assault Weapons Control Act of 1989 (the "Act"), Cal. Pen. Code § 12275 *et seq.*. The Act makes it a felony, punishable by a minimum of four years in prison, to manufacture, distribute, transport, import, keep for sale, give or lend a specifically listed firearm or "minor

variations" of listed firearms. *Id.*, § 12280; *see also* § 12276 (the "list" provision). The Act also prohibits firearms that are added to the statutory list by a judicial add-on proceeding commenced by the California Attorney General. *Id.*, § 12276.5 (the "add-on" provision).

Petitioners challenged the Act on several state and federal constitutional grounds, specifically contending, *inter alia*, that:

1) The Act's add-on mechanism violated the Due Process Clause of the Fourteenth Amendment by failing to give actual notice to known gun owners and dealers, by depriving gun owners and dealers of the right to participate in the judicial proceeding in which their individual property rights would be affected, by making the ruling in the potentially non-adversarial civil proceeding conclusive in subsequent criminal proceedings against gun owners and dealers who were not permitted to participate in the civil add-on proceeding, by making criminal the sale or transport of firearms prohibited as a result of the civil add-on proceeding even before notice of the proceeding's results were promulgated in the California Code of Regulations, and by giving to the Attorney General unbridled discretion to add firearms to the prohibited list based on an unconstitutionally vague definition, Amended Complaint ¶¶ 53-68, 78-82, 88-97, 107-118;

2) The Act's add-on proceeding violated the Equal Protection Clause of the Fourteenth Amendment by affording to manufacturers and distributors, but not to individual gun owners and dealers, a right to intervene in the proceeding, Amended Complaint ¶¶ 98-103;

3) The statutory list of prohibited firearms irrationally lists the firearms of some individuals while excluding identical or virtually identical firearms of other individuals, in violation of the Equal Protection Clause of the Fourteenth Amendment, Amended Complaint ¶¶ 50-52.

The Superior Court sustained a demurrer without leave to amend except as to one cause of action not at issue here, and dismissed the entire action when Petitioners declined to amend, Pet. App. 103a. The California Court of Appeal, Third District, reversed, holding that the Act's "add-on" procedure effectively required judges to legislate in violation of separation of powers provision of the California constitution and that the Act violated the Due Process clause of the Fourteenth Amendment to the United States Constitution because it was unduly vague and because the add-on provision failed to give citizens advance notice of the conduct prohibited by it. Pet. App. 83a-85a. The Court of Appeal also held that the list provision was irrationally underinclusive in violation of the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 89a.

The Supreme Court of California reversed. Explicitly declining to follow the Sixth Circuit's reasoning in *Springfield Armory, Inc.* v. *City of Columbus*, 29 F.3d 250, 252 (6th Cir. 1994), it rejected petitioners' claim that the selective inclusion of some firearms and exclusion of other identical or virtually identical firearms deprived the owners of banned firearms of the equal protection of the laws. The court held that the Act's selective prohibition of some firearms but not other identical or virtually identical firearms was not irrational "because a perfectly comprehensive regulatory scheme was not politically achievable." Pet. App., 14a.

In her separate concurring opinion, Justice Brown (who also authored the primary opinion) acknowledged that the legislature's findings and its list declaration "seem internally inconsistent," and that "[c]onspicuous by its absence is any

finding that the listed weapons differ from those not listed with respect to the salient characteristic, namely, their 'rate of fire and capacity for firepower,'" but she nevertheless thought the partial list valid because "the Legislature sought to satisfy its need to do something about gun violence without awakening the political enmity of a large and effective constituency." Pet. App. 40a, 42a (Brown, J., concurring).

Justice Kennard argued in dissent that the majority had misapplied the rule, articulated by this Court in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), permitting legislatures to address problems one step at a time. Justice Kennard believed that the majority failed to recognize that "the distinctions that are drawn [must] have some relevance to the purpose for which the classification is made." Pet. App. 51a (Kennard, J., dissenting) (quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-09 (1966) (internal quotation marks omitted)).

The court did not address petitioners' other Equal Protection claim, namely, that affording to manufacturers and distributors a right to intervene in the add-on proceedings that was denied to gun owners and dealers denied the latter the equal protection of the laws. Yet that claim was specifically raised in the complaint (Amended Complaint ¶¶ 98-103, *reprinted in* Pet. App. 104a-107a), before the intermediate court of appeals (Appellants' Opening Br., at ii-iii, 93-98, *reprinted in* Pet. App.108a-113a), and before the California Supreme Court (Appellants' Answer Br. at 1, 41-42, *reprinted in* Pet. App. 114a-116a; Petn. for Limited Rehearing, at 3-7, *reprinted in* Pet. App. 117a-121a).

The court also rejected petitioners' several Due Process claims. Explicitly (though erroneously) distinguishing *Springfield Armory* and the Supreme Court of Colorado's decision in *Robertson* v. *City and County of Denver*, 874 P.2d 325 (Colo. 1994), the court held that references in the Act's add-on provision to firearms that are but "slight modifications" or "redesign[ed]" versions of listed firearms was not unconstitutionally vague because those were issues to be addressed by

the Attorney General in deciding whether to commence an add-on proceeding, not issues that ordinary citizens would have to address once the add-on proceeding was concluded and specific named firearms were added to the statutory list. Pet. App. 29a.

Finally, although the Court acknowledged that petitioners' notice and opportunity to be heard claims "would raise grave due process concerns" if a prosecution was commenced based on the results of the civil add-on proceedings, it rejected petitioners' challenge, holding that the statute was not "facially unconstitutional." Pet. App. 32a.

REASONS FOR GRANTING THE WRIT

I. The California Supreme Court's Approval Of The "Add-On" Provision, Which Permits The Banning Of Property In A Judicial Proceeding Without Notice To The Affected Property Owners, Violates The Right To Due Process Protected By The 14th Amendment And Conflicts With A Decision By Another State's Highest Court.

The Act allows the Attorney General of California to petition a superior court for a declaration that a particular firearm should be added to the list of prohibited firearms because it is either a "copy" or "slight modification" of a listed firearm or because it is a "redesigned, renamed, or renumbered" version of a listed firearm. § 12276.5(a)(1-2). Upon filing the petition, the superior court must issue an order of temporary suspension, pursuant to which the "manufacture, sale, distribution, transportation, or importation" of the designated firearm becomes illegal while the petition is pending before the superior court. §§ 12276.5(a) & (b); 12280. The superior court then decides—after a hearing in which owners and dealers of the firearm have no right to participate, *see* § 12276.5(e)—whether the proposed firearm meets the statutory criteria. If the court finds that it does, it issues a declaration to that effect and the Attorney General

eventually adds the firearm to the list of prohibited firearms published periodically in the California Administrative Code. § 12276.5(h).

A. The California Supreme Court's Decision Is In Conflict With This Court's Due Process Precedents Regarding Notice And An Opportunity To Be Heard.

California's add-on procedure violates the Due Process Clause of the Fourteenth Amendment in several ways. First, only constructive notice (publication in ten newspapers around the state and in industry publications) of the add-on proceeding is provided to dealers and owners when actual notice to dealers and registered owners is possible.[1] A law providing for "notice by publication is not sufficient with respect to an individual whose name and address are known or reasonably ascertainable." *Robinson* v. *Hanrahan*, 409 U.S. 38, 40 (1973); *see also Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 795-800 (1983) ("Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed").[2]

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[1] Actual notice is only provided to "any known manufacturer and California distributor of the weapon which is the subject of the temporary suspension order" and to those individuals who have requested to receive notice of any declaration of temporary suspension. § 12276.5(d). Yet the Department of Justice has within its own files the names and addresses of all licensed California firearms dealers and all registered handgun owners. *See* Amended Complaint ¶ 95; *see also* Cal. Penal Code § 12076 (requiring that every retail purchaser of a handgun register name and address with the Department of Justice).

[2] The fact that firearms owners are permitted, pursuant to § 12276.5(d), to file a request for personal notice of the pendency of a § 12276.5 proceeding does not alter this conclusion. Fewer than .4% of the estimated ten million California gun owners have filed such requests, and

Second, the Act limits notice and the right to intervene to any known "manufacturer and California distributor of the weapon which is the subject of the temporary suspension order." § 12276.5(e). Owners and dealers are therefore not permitted to intervene in the superior court proceeding in which their individual property interests will be determined, although they may participate as amicus curiae at the discretion of the superior court. *Id.* This is especially troubling if a firearm against which an add-on proceeding is brought is a low production or out-of-production firearm; in such cases, it is very likely that no one will intervene to oppose the Attorney General's petition. As this Court has previously held, "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 327 n.7 (1979); *see also Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 16, n.17 (1978) (due process hearing includes right to support one's claim by proof); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424-425 (1915) ("It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard").

Third, the superior court proceeding conclusively determines whether a particular firearm meets the requirements of § 12276.5 in all future criminal prosecutions, taking that element of the crime of possession or transfer of such a firearm away from the jury, and indeed away even from the criminal court wherein individual defendants would be prosecuted. With respect to whether their firearm meets the

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the vagueness of the statutory provisions ("redesigned") makes many owners unaware that their firearms are even potentially the subject of a § 12276.5 proceeding. *See Springfield Armory*, 29 F.3d, at 252; *Peoples Rights Organization, Inc.* v. *City of Columbus*, 152 F.3d 522, 537 (6th Cir. 1998); *Robertson* v. *City and County of Denver*, 874 P.2d 325, 334-35 (Colo. 1994); *see also infra*, at 10-12.

statutory criteria, individual defendants are therefore denied the fundamental Due Process rights to confront witnesses, to present evidence, to have a jury trial, and to be judged under a reasonable doubt standard rather than the preponderance of the evidence standard that governs the § 12276.5 proceeding, *see* § 12276.5(f). Such a proceeding violates this Court's well-established Due Process clause precedent. *See Duncan* v. *Louisiana*, 391 U.S. 145 (1968) (jury trial); *Montana* v. *Egelhoff*, 518 U.S. 37, 64 (1996) (right to present evidence); *Pointer* v. *Texas*, 380 U.S. 400 (1965) (confront witnesses); *Jackson* v. *Virginia*, 443 U.S. 307 (1979) (proof beyond a reasonable doubt).

Finally, by allowing the Attorney General to broaden the Act's coverage to include firearms that he deems to be "slight modifications" or "redesigned" versions of listed firearms, § 12276.5(a)(1-2), the statute is unduly vague, giving to the Attorney General (and to the Superior Court) the unbounded discretion to enact rather than simply interpret the law and failing to give adequate notice to individual firearms owners even to be on the lookout for an add-on proceeding affecting their interests.[3] This Court has repeatedly made clear that laws which forbid or require the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its application violate Due Process. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

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[3] While the California Supreme Court rejected petitioners' vagueness challenge on the ground that any vagueness evaporates once the firearm is listed under the add-on procedure, the statutory vagueness does affect whether individual owners and dealers will even be on the lookout for "add-on" proceedings that might render routine transportation or sale of their firearms criminal prior to publication of the add-on list. Moreover, the statutory list itself contains a similar vagueness defect. *See* § 12276(e) ("The term 'series' includes all other models that are only *variations, with minor differences*, of those models listed in subdivision (a), regardless of the manufacturer" (emphasis added)).

B. The Decision Below Conflicts With A Decision By The Supreme Court of Washington.

The California Supreme Court's holding that the Act's add-on mechanism does not facially violate Due Process is in conflict with *Soundgarden* v. *Eikenberry*, 871 P.2d 1050 (Wash. 1994), in which the Washington Supreme Court held that a similar statutory scheme did violate Due Process.[4]

The statute in *Soundgarden* provided for a civil proceeding, much like that commenced under the California Act by the Attorney General's petition, in which a music video could be declared "erotic." Notice of the suit need only be provided to one vendor of the video, yet criminal penalties attached to *any* vendor of the video once the declaration issued. *Id.*, at 1056. The court held that the declaratory mechanism, followed by subsequent criminal prosecution of persons not party to the initial civil proceeding, did "not measure up to the due process requirement of *McKinney* [v. *Alabama*, 424 U.S. 669 (1976)]." *Id.*, at 1063. Specifically, the court found that the Washington mechanism violated the due process requirements of notice and an opportunity to be heard, and also the constitutional right to a trial by jury. *Id.*

C. The Decision Below Also Conflicts With Decisions By The Supreme Court of Colorado and the Sixth Circuit Court of Appeals.

In addition, the California Supreme Court's holding that the add-on provision is not unconstitutionally vague conflicts with recent decisions of the Sixth Circuit and the Colorado Supreme Court. In *Robertson* v. *City and County of Denver*, 874 P.2d 325 (Colo. 1994), the Colorado Supreme Court invalidated a Denver ordinance which prohibited "[a]ll semiautomatic pistols that are *modifications* of [listed] rifles having the same make, caliber and action design but a shorter

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[4] *Soundgarden* also involved a First Amendment challenge, but only the Due Process argument, which was separately articulated by the court, is relevant here.

barrel and no rear stock or *modifications* of automatic weapons originally designed to accept magazines with a capacity of twenty-one (21) or more rounds." *Id.*, at 334 (quoting Denver Revised Municipal Code § 38-130(b)(1)(c) (emphasis added)). The ordinance was unconstitutionally vague, according to the court, because it did not "provide sufficient information to enable a person of common intelligence to determine whether a pistol they possess or may purchase has a design history of the sort which would bring it within this section's coverage." *Id.*, at 335. "[A]scertaining the design history and action design of a pistol is not something that can be expected of a person of common intelligence." *Id.*

Similarly, the Sixth Circuit struck down a Columbus, Ohio ordinance banning specified firearms and "other models by the same manufacturer with the same action design that have *slight modifications or enhancements*." *Springfield Armory*, 29 F.3d, at 252 (quoting Columbus City Codes § 2323.01(1) (emphasis added)). The ordinance was "unconstitutionally vague on its face," according to the court, because "ordinary consumers cannot be expected to know the development history of a particular weapon" and therefore whether their weapon was merely a "modification" of one of the listed weapons. *Id.*, at 250, 253; *accord*, *Peoples Rights Organization*, 152 F.3d, at 537.

Because the California Act requires that individual consumers possess the same knowledge of a firearm's development history in order to know whether it is only a "slight modification" or "redesigned" version of a listed firearm that might be subject to an add-on proceeding as Columbus and Denver consumers were required to possess in order to know whether a firearm was merely a "modification," the California Act would not survive under the Colorado Supreme Court's ruling in *Robertson* or the Sixth Circuit's rulings in *Springfield Armory* and *Peoples Rights*

Organization. The split in decision about this fundamental aspect of Due Process warrants this Court's review.

II. By Denying Owners And Dealers Of The Same Right To Intervene In The Judicial Add-On Proceeding That It Affords To Manufacturers And California Distributors, The Act Deprives Owners And Dealers Of The Equal Protection Of The Laws.

As noted above, the add-on provision of the Act provides "manufacturers and California distributors" with a right to intervene in the judicial add-on proceeding, but provides no such right to owners or dealers, despite the fact that the latter groups' interests in the firearms that are the subject of the proceeding is at least as great as the former groups' interests. § 12276.5(d). Because the right not to be deprived of property without due process of law is a fundamental constitutional right, *cf. San Antonio Ind. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 33 (1973) (describing as fundamental those rights that are "explicitly or implicitly guaranteed by the Constitution"), the legislative classification must be subjected to strict scrutiny, and can only be sustained if it is narrowly tailored to serve a compelling governmental interest.

Rather than finding that the Act was narrowly tailored to further a compelling governmental interest, the California Supreme Court did not address this equal projection claim at all, even after the omission was brought again to the court's attention in a petition for rehearing. The state courts cannot avoid review by this Court of federal constitutional issues merely by failing to address federal constitutional issues that have been properly raised. *Chambers* v. *Mississippi*, 410 U.S. 284, 290 n.3 (1973); *Street* v. *New York*, 394 U.S. 576, 584 (1969); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).

III. The Act Arbitrarily and Irrationally Restricts The Firearms of Some While Leaving Identical or Virtually Identical Firearms of Others Unregulated, Contrary to the Equal Protection Rulings of this Court and in Conflict with the Sixth Circuit.

A. The Decision Below Conflicts with this Court's Equal Protection Precedents.

The California Act prohibits certain specified firearms but not identical or virtually identical, functionally equivalent firearms produced by other manufacturers.[5] As the Sixth Circuit recognized in striking down the similar Columbus, Ohio, ordinance (which was modeled on the California Act), "The Colt AR-15 Sporter is banned but not identical weapons sold by" seven other manufacturers. *Springfield Armory*, 29 F.3d, at 252. The California Department of Justice has gone even further, identifying twelve additional firearms identical to the Colt AR-15 that are not banned by the California Act.[6] Numerous other examples of this "under-inclusion" of identical or nearly identical firearms problem exist in the Act's statutory list.[7]

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[5] What is meant by "identical" is that the firearms are clones of each other. For example, if the banned Colt and the eighteen unregulated clones are disassembled into a common container, nineteen "new" rifles could be reassembled from the jumble of interchangeable parts. The only part that is distinguishable is the receiver, and that only because it bears the manufacturer's name. Virtually identical firearms, though not identical clones, are indistinguishable from each other in action type, cartridge size, and weight, as well as in the rate of fire and capacity for firepower, the only characteristics recognized by the codified legislative findings. *See infra*, at 15 n.8.

[6] A Department of Justice memorandum introduced in the trial court identified 15 "manufacturers/importers or suppliers of the AR-15 type rifle." Three of these were also identified by the Sixth Circuit in *Springfield Armory*, as were four others, which the California Department of Justice did not identify.

[7] Amended Complaint ¶¶ 17-23. The fact that the Attorney General might

The California Supreme Court itself has subsequently acknowledged that listed weapons are not "universally distinguishable by their appearance from firearms not listed in section 12276." *In re Jorge M.*, 4 P.3d 297, 307 (Cal. 2000). "While many of the rifles depicted in the [California Attorney General's Assault Weapons] Identification Guide are of particularly menacing appearance," noted the court, others "are not obviously unsuited, to the untrained eye at least, for hunting, ranching and farming uses, or target shooting. *Id.*, at 308 (citing California Attorney General's Assault Weapons Identification Guide pp. 6, 7, 18, 23, 26, 28 (1993)). "Conversely," continued the court, "several unlisted semiautomatic rifles have unusual military-type features and appear, again to the untrained eye, unlikely sporting or working guns. *Id.* (citing Walter, Rifles of the World 384, 404, 442, 439 (2d ed. 1998)).

By definition, a classification is irrational if there is no difference between the subjects it includes and those it excludes. Even with respect to firearms that are not identical but merely comparable in size, magazine capacity, and rate of fire, however, the classifications made by the Legislature are irrational with respect not only to the Legislature's stated purpose, *see* § 12275.5,[8] but with respect to any conceivable legitimate governmental purpose.

Indeed, the factual allegations in the complaint, backed by the government's own documents, belie any rational basis for

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utilize the judicial add-on proceeding to bring some or even all of the clones within the Act's prohibitions at some point in the future does not remedy the present equal protection violation. Apart from the unconstitutionality of that process, *see supra*, Part I, unequal treatment is not permissible merely because at some point in the future the government might make the statute less unequal.

[8] Section 12275.5, titled "Legislative findings and declarations," provides in relevant part: "The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a *high rate of fire and capacity for firepower* that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." (Emphasis added).

the Act's classification scheme. The firearms on the statutory list are less deadly, not more deadly, than other types of firearms, and the Act's backers in the legislature rejected a Department of Justice offer to gather data on the subject because the results were "unlikely to support the theses on which the legislation would be based," according to a DOJ internal memorandum. Amended Complaint ¶ 28. Quite obviously, the Legislature's own deliberate indifference to facts that destroy any pretense of rationality for the statutory classification is not entitled to the deference of this or any Court.

The Equal Protection Clause requires that a "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)); *see also Romer* v. *Evans*, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause"); *Peoples Rights Organization*, 152 F.3d, at 532. The decision of the California Supreme Court is contrary to this well-established precedent.

B. The Decision of the California Supreme Court Broadens an Existing Conflict Among State Courts and at least one Federal Court of Appeals.

Quite apart from the fact that the California Supreme Court decision under review cannot be squared with the general Equal Protection principles that have been articulated by this Court, the decision—and like decisions by the Connecticut Supreme Court and the Eastern District of Michigan—is in conflict with the Sixth Circuit's decisions in *Springfield Armory*, 29 F.3d 250, and *Peoples Rights Organization*, 152 F.3d 522, as well as the decision of the

New York Supreme Court in *Citizens for a Safer Community* v. *City of Rochester*, 627 N.Y.S.2d 193 (N.Y. App. Div. 1994).

In *Springfield Armory*, the Sixth Circuit struck down a Columbus, Ohio ordinance that had been modeled on the California statute. As with California's statute, the City of Columbus, Ohio, banned a specified list of firearms but not other identical, or virtually identical firearms. The Sixth Circuit found the ordinance to be "fundamentally irrational" because it outlawed "certain brand names without including within the prohibition similar assault weapons of the same type, function or capability." 29 F.3d, at 252. As a result, the ordinance did not achieve its stated goal of getting assault weapons off the street. "The ordinance purports to ban 'assault weapons,'" noted the Sixth Circuit, "but in fact it bans only an arbitrary and ill-defined subset of these weapons without providing any explanation for its selection." *Id.*[9] The Sixth Circuit subsequently reiterated its position in *Peoples Rights Organization*, 152 F.3d 522.

There is also a direct conflict with the decision of the New York Supreme Court in *Citizens for a Safer Community*. The city ordinance at issue in the case, like the statute at issue here, defined a specific list of rifles and shotguns as prohibited "assault weapons" without listing identical firearms produced by other manufacturers. *Id.*, at 203. The court found that there was no support in the legislative record or in the exhibits introduced in the litigation "for the notion that there is a difference in the danger posed to society by identical guns produced by different manufacturers, and no such distinction can be found through an exercise of reason." *Id.*, at 204. The court then held that "to the extent [the ordinance]

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[9] The Sixth Circuit invalidated the ordinance as unconstitutionally vague, because plaintiffs had not raised an Equal Protection claim. Nevertheless, the language utilized by the Sixth Circuit unmistakably demonstrates that the Sixth Circuit also viewed the ordinance as a violation of Equal Protection clause, under rational basis review.

names individual weapons, and excludes others that are identical, it is a violation of the equal protection clause of the United States Constitution, and it may not be enforced by the City." *Id.*

In stark contrast, other courts have upheld similar "list" legislation against Equal Protection challenges, just as the California Supreme Court did below. Last March, the District Court for the Eastern District of Michigan upheld, under the Equal Protection component of the Fifth Amendment,[10] Title XI of the Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 921 *et seq.*, which makes criminal the manufacture, transfer, or possession of a specified list of "semiautomatic assault weapons" but not of other, virtually identical weapons. "[M]ere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment," held the court. *Olympic Arms* v. *Magaw*, 91 F. Supp. 2d 1061, 1073 (E.D. Mich. 2000) (quoting *New Orleans* v. *Dukes*, 427 U.S. 297 (1976)).[11] Finding that the prohibition of assault weapons was rationally related to the legitimate governmental purpose of protecting public safety, the court upheld the ordinance.[12]

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[10] *See Bolling* v. *Sharpe*, 347 U.S. 497, 499-500 (1954).

[11] Here, petitioners have contended that the Act's list is both under-inclusive (by irrationally excluding firearms that are identical or virtually identical to those on the list) and over-inclusive (by classifying as assault weapons firearms with vastly different characteristics). Amended Complaint ¶¶ 14-23.

[12] The Eastern District of Michigan appears to have misapplied the rational basis test, which addresses whether the *classification* is rationally related to a legitimate governmental purpose, not whether the *prohibition* is. *See FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) ("a statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis *for the classification*" (emphasis added)); *Romer*, 517 U.S., at 632 ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained"); *Peoples*

Similarly, in *Benjamin v. Bailey*, 662 A.2d 1226 (Conn. 1995), the Connecticut Supreme Court held that a similar "list" statute was valid under the Equal Protection Clause because plaintiffs "offered no evidence whatsoever suggesting that the legislature knew that any of the unproscribed weapons posed as great a threat to the welfare of the residents of this state as do the proscribed weapons." *Id.*, 662 A.2d, at 1238-39.[13]

Lurking behind this broadening split among the nation's courts is the allegation in petitioners' complaint, supported by documentary evidence and acknowledged by the California Supreme Court, that the real reason for the selective classification adopted by the Legislature was to avoid the political opposition that listing the more popular firearms would have generated. Amended Complaint ¶ 28; *see also* Pet. App. 14a (majority opinion) ("the Legislature was not constitutionally compelled to throw up its hands just because a perfectly comprehensive regulatory scheme was not politically achievable"); Pet. App. 42a (Brown, J., concurring)

Rights Organization, 152 F.3d, at 532. The Eastern District of Michigan did not address how the classification furthered the legislative purpose.

[13] *Benjamin* also highlights a developing split of authority on the issue whether the Equal Protection Clause even applies to a statutory classification of things rather than persons. Relying in part on *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), in which this Court allowed an Equal Protection challenge to a legislative classification between plastic and non-plastic milk containers, the California Supreme Court below held that it did. Pet. App. 4a. The Connecticut Supreme Court in *Benjamin* held that it did not, although it nonetheless proceeded to assess whether the classification was valid under the Equal Protection Clause. 662 A.2d, at 1235-36. *See also Olympic Arms*, 91 F. Supp. 2d, at 1070 (recognizing the split, siding with *Benjamin*, but then holding that the statutory classification was valid under the Equal Protection Clause, in any event). The decision below is more in accord with this Court's precedents. *See, e.g., Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("the dichotomy between personal and property rights is a false one. Property does not have rights. People have rights. *The right to enjoy property without unlawful deprivation*, no less than the right to speak or the right to travel, is in truth, a 'personal right'" (emphasis added)).

("the Legislature sought to satisfy its need to do something about gun violence without awakening the political enmity of a large and effective constituency"). As described by the California Department of Justice itself, in an internal memorandum prepared by the department's chief legislative liaison on the subject:

> *It was agreed that certain weapons probably had too large a constituency to ever be worth the risk of including* . . . . Most of the weapons on the [§ 12276] list are low production or long out of production items that constitute no conceivable threat.

Amended Complaint, Ex. B, at 2 (emphasis added). The point is made especially clear by Florida State University criminologist Gary Kleck, a leading authority on firearms violence, who observed that authors of "assault weapon" (AW) bans:

> have had to tackle the *difficult* task of developing a definition [of AWs] that simultaneously satisfied two conflicting requirements: (1) it identified the attributes that supposedly make AWs more dangerous than other guns, and (2) *was sufficiently limited so as not to restrict gun models popular among large numbers of voters*. . . . ¶ As a way out of this conflict, many policymakers have thrown up their hands and declined to identify the dangerous attributes of AWs. Instead, the proposed bills include long lists of specific makes and models of guns that have little in common. . . . Legislation passed in California . . . heterogeneous lists of specific gun models. ¶ The difficulties with this political compromise are obvious. . . [If AWs are especially dangerous,] it makes little crime control sense [though ample political sense] to systematically exclude the most widely owned models which have

these attributes, since this severely limits the impact of regulation.[14]

While the Legislature is free to take account of political considerations in deciding how much of a perceived problem to deal with legislatively, *cf. Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), it is not free to selectively apply the law only to those with relatively little political power while leaving other, similarly situated individuals immune from the legislative prohibitions. Targeting a certain subset of firearms merely because their owners are politically powerless is simply not a legitimate governmental purpose. *See United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

A classification that restricts the use of unpopular firearms while leaving more popular, virtually identical firearms unrestricted simply has no reasonable relationship to the legislature's stated purpose of furthering public safety, or any conceivable legitimate purpose, for that matter. Indeed, the only difference between many of the listed firearms from their unlisted counterparts is price—and the lower-priced firearms are on the *unlisted* side of the legislature, hardly a rational classification to further the legislature's stated purpose of countering the proliferation and use of firearms with a high rate of fire and capacity for firepower. Amended Complaint ¶¶ 16-23.

The legislative classification did have some purpose, of course. It allowed the legislature to restrict some firearms, and with the add-on mechanism, the Attorney General is now able to accomplish through the judicial back door what there was insufficient political support to accomplish in the

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[14] G. Kleck, Point Blank: Guns and Violence in America 71-72 (N.Y., Aldine, 1991) (emphasis added). This book has been hailed as the definitive treatise on gun control. *See, e.g.*, Mauser, 3 Crim. L. Forum 147 (1992); Kessler, 82 J. Crim. L. & Crimin. 1187 (1992); Ross, 98 American J. Soc. 661 (1992).

legislature. To our knowledge, the "any conceivable rationale" language of the rational basis test has never been understood to support classifications that further illegitimate purposes, and the end run around the political process is the height of illegitimacy. As the California Supreme Court has itself previously acknowledged:

> [T]here is no more effective guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose on a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Hays v. *Wood*, 603 P.2d 19, 26 (Cal. 1979) (quoting *Railway Express* v. *New York*, 336 U.S. 106, 112-113 (1949) (Jackson, J., conc.); *see also Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985).

Particularly because of the broadening split among the nations' courts on this important issue, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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